# Badan Pengurusan Bersama Avenue K dan K Residence v City Properties Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(A)-862–05 OF 2024
NANTHA BALAN, LIM CHONG FONG AND WAN AHMAD FARID JJCA
22 JANUARY 2025

*Land Law — Strata title — Management corporation — Dispute on maintenance charges and sinking fund contribution payment — Respondents who owed arrears in maintenance charges and sinking fund contributions were not allowed to vote in appellant's annual general meeting ('AGM') — Respondents' originating summons to invalidate AGM allowed by High Court — Whether High Court correctly determined validity of AGM and voting rights based solely on existence of dispute over arrears*

The appellant was the joint management body of the Avenue K and K Residence which was a strata scheme development in Kuala Lumpur ('the project'). The first respondent was a company and the registered proprietor of the land on which the project was situated as well as the parcel owner of Avenue K and Tower B of K Residence. The second respondent was a company and the developer of the project and parcel owner of a unit in Tower A of K Residence. The third to eighth respondents, each a company or an individual, were parcel owners of specific units within K Residence. Save for the sixth respondent, the other corporate body respondents had directors who had familial relationship with Tan Sri Dato' Yap Yong Seong and his wife, the fifth respondent ('the Yap family'). The respondents and their associated parties had collectively 150,882 aggregate share units in the project which made up about 78% of the total voting shareholding in that strata development scheme. The second respondent completed the project and delivered vacant possession in 2008. However, the second respondent did not cause the setting up of the appellant within the statutory period of 12 months; hence its formation on 15 September 2018 pursuant to the first annual general meeting ('AGM'). The second respondent managed the maintenance charges and sinking fund contribution accounts of the project for ten years, receiving payments from K Residence owners. Between June 2016 and July 2018, five agreements entered between the second and first respondents resulted in a contra settlement of utilities and services provided by the first respondent ('contra adjustments') against the maintenance charges and sinking fund contribution payments. Furthermore, the respondents did not pay their corresponding maintenance charges and sinking fund contribution payment and the project maintenance charges and sinking fund contribution accounts were neither fully prepared

nor audited. During the first AGM, the Commissioner of Building decided that the first and second respondents were not entitled to vote. Upon the appellant having been put under the control of the parcel owners not associated with the Yap family, the appellant reversed the contra adjustments. Accordingly, the appellant filed Suit 310 to challenge the contra adjustments. The first respondent then filed OS 1754 to invalidate the first AGM and take control of the maintenance and management of the project. The order that was given to the first respondent was set aside upon the appellant's application after its intervention as party thereto. Subsequently Suit 724 was commenced to challenge the reversal of the contra adjustments and to nullify all resolutions passed in the second AGM. Suit 310 and Suit 724 ('the suits') were pending. The respondents further commenced an originating summons ('OS 510') seeking further reliefs relating to the validity of the first AGM and second AGM. After hearing OS 510 based solely on affidavit evidence, the learned judicial commissioner ('JC') allowed the application. Hence, this appeal by the appellant.

**Held**, allowing the appeal:

(1) The JC primarily granted all the reliefs as prayed for by the respondents. These were final and not interlocutory reliefs pending the determination of the issues in the suits that were awaiting trial. The JC erred by disposing the whole of OS 510 in favour of the respondents solely and entirely based on the finding there was prima facie in existence a valid dispute on arrears pertaining to maintenance charges and sinking fund contribution payment by the respondents which had already been referred to court. The cause(s) of action and reliefs sought in the suits overlapped and were inextricably intertwined with the cause(s) of action and reliefs sought in OS 510. The satisfactory and fair resolution of all these related matters of fact and law must be resolved altogether by way of a trial. In this respect it could not be agreed with the approach taken by the JC that OS 510 could be resolved by deciding on a single issue on the existence of a valid dispute. Further, it was artificial and definitely unsatisfactory to merely inquire into the existence without also dealing with the ultimate validity of the dispute when construing and applying paras 21(1) and 21(2) of the Strata Management Act 2013 together. The JC erred by only considering the former but not the latter (see paras 39, 45 & 49).

(2) The JC erred by disposing the entire OS 510 based only on affidavit evidence without holding a trial. There was a serious misdirection made by the JC that warranted appellate intervention. The JC should have in the interest of justice converted OS 510 into a writ action pursuant to O 28 r 8 of the Rules of Court 2012. The JC erred in failing to exercise his discretion properly to have all the matters of fact and law in issue satisfactorily resolved. This was a non-direction that again justified

appellate intervention. OS 520 was directed to be converted into a writ and the affidavits filed to stand as pleadings and be disposed by the same judge hearing the suits (see paras 50–52 & 54–55).

**[Bahasa Malaysia summary**

Perayu adalah badan pengurusan bersama untuk Avenue K dan K Residence yang merupakan pembangunan skim strata di Kuala Lumpur ('projek'). Responden pertama adalah sebuah syarikat dan pemilik berdaftar tanah di mana projek itu terletak serta pemilik petak Avenue K dan Menara B K Residence. Responden kedua adalah sebuah syarikat dan pemaju projek tersebut serta pemilik petak sebuah unit di Menara A K Residence. Responden ketiga hingga kelapan, terdiri daripada syarikat atau individu, adalah pemilik petak unit tertentu dalam K Residence. Kecuali responden keenam, responden badan korporat yang lain mempunyai pengarah yang mempunyai hubungan kekeluargaan dengan Tan Sri Dato' Yap Yong Seong dan isterinya, responden kelima ('keluarga Yap'). Responden dan pihak yang berkait dengan mereka secara kolektif mempunyai 150,882 unit saham agregat dalam projek tersebut yang mewakili kira-kira 78% daripada jumlah pemilikan saham yang mengundi dalam skim pembangunan strata tersebut. Responden kedua menyiapkan projek tersebut dan menyerahkan milikan kosong pada tahun 2008. Walau bagaimanapun, responden kedua telah tidak menubuhkan perayu dalam tempoh berkanun 12 bulan; oleh itu, ia ditubuhkan pada 15 September 2018 berikutan mesyuarat agung tahunan ('AGM') pertama. Responden kedua menguruskan caj penyelenggaraan dan akaun caruman dana terikat projek tersebut selama sepuluh tahun, menerima bayaran daripada pemilik K Residence. Antara Jun 2016 dan Julai 2018, lima perjanjian dibuat antara responden kedua dan pertama yang mengakibatkan penyelesaian kontra utiliti dan perkhidmatan yang disediakan oleh responden pertama ('pelarasan kontra') terhadap pembayaran caj penyelenggaraan dan bayaran caruman dana terikat. Tambahan pula, responden tidak membayar caj penyelenggaraan dan bayaran caruman dana terikat yang berkenaan serta akaun caj penyelenggaraan dan caruman dana terikat projek tidak disediakan ataupun diaudit sepenuhnya. Semasa AGM pertama, Pesuruhjaya Bangunan memutuskan bahawa responden pertama dan kedua tidak berhak untuk mengundi. Apabila perayu dikendalikan oleh pemilik petak yang tidak berkait dengan keluarga Yap, perayu membatalkan pelarasan kontra tersebut. Oleh itu, perayu memfailkan Saman 310 untuk mencabar pelarasan kontra tersebut. Responden pertama kemudiannya memfailkan OS 1754 untuk membatalkan AGM pertama dan mengambil alih penyelenggaraan dan pengurusan projek. Perintah yang diberikan kepada responden pertama diketepikan atas permohonan perayu selepas campur tangannya sebagai pihak. Selepas itu, Saman 724 difailkan untuk mencabar pembalikan pelarasan kontra dan untuk membatalkan semua resolusi yang diluluskan dalam AGM kedua. Saman 310 dan Saman 724 ('saman-saman') belum selesai. Responden selanjutnya memulakan saman pemula ('OS 510') untuk mendapatkan relief lanjut

berkaitan dengan kesahihan AGM pertama dan AGM kedua. Setelah mendengar OS 510 berdasarkan keterangan afidavit semata-mata, Pesuruhjaya Kehakiman yang bijaksana ('PK') membenarkan permohonan tersebut. Oleh itu, rayuan ini oleh perayu.

**Diputuskan**, membenarkan rayuan:

(1) PK secara utama memberikan semua relief yang dipohon oleh responden. Ini adalah relief muktamad dan bukan relief interlokutori yang menunggu penyelesaian isu-isu dalam saman yang menunggu perbicaraan. PK terkhilaf dengan melepaskan keseluruhan OS 510 yang menyebelahi responden semata-mata dan sepenuhnya berdasarkan penemuan bahawa terdapat prima facie wujudnya pertikaian yang sah mengenai tunggakan berkaitan caj penyelenggaraan dan pembayaran caruman dana terikat oleh responden yang sudah dirujuk ke mahkamah. Kuasa tindakan dan relief yang dipohon dalam saman-saman bertindih dan berkait dengan kausa tindakan dan relief yang dipohon dalam OS 510. Penyelesaian yang memuaskan dan adil bagi semua perkara berkaitan fakta dan undang-undang ini mesti diselesaikan secara keseluruhan melalui perbicaraan. Dalam hal ini, tidak boleh dipersetujui dengan pendekatan yang diambil oleh PK bahawa OS 510 boleh diselesaikan dengan memutuskan satu isu mengenai wujudnya pertikaian yang sah. Selanjutnya, adalah tidak wajar dan pasti tidak memuaskan untuk hanya menyiasat kewujudan tanpa juga menangani kesahan muktamad pertikaian ketika mentafsir dan menerapkan perenggan 21(1) dan 21(2) Akta Pengurusan Strata 2013 secara bersama. PK melakukan kesilapan dengan hanya mempertimbangkan yang pertama tetapi tidak yang kedua (lihat perenggan 39, 45 & 49).

(2) PK terkhilaf dengan melepaskan seluruh OS 510 hanya berdasar kepada keterangan afidavit tanpa mengadakan perbicaraan. Terdapat salah arah yang serius dilakukan oleh PK yang memerlukan campur tangan rayuan. PK seharusnya, demi kepentingan keadilan, menukarkan OS 510 menjadi tindakan writ menurut A 28 k 8 Kaedah-Kaedah Mahkamah 2012. PK terkhilaf dalam gagal menggunakan budi bicaranya dengan betul untuk memastikan semua perkara fakta dan undang-undang dalam isu diselesaikan dengan memuaskan. Ketiadaan arahan ini sekali lagi membenarkan campur tangan rayuan. OS 520 diarahkan untuk ditukarkan menjadi writ dan afidavit yang difailkan dianggap sebagai pliding dan mesti diselesaikan oleh hakim yang sama yang mendengar saman-saman (lihat perenggan 50–52 & 54–55).]

**Cases referred to**

*Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act* 1985) [2018] 4 MLJ 284; [2019] 2 CLJ 592, CA (refd)

*Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ

193; [1995] 1 AMR 373, CA (refd)
*Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Ors and other appeals* [2024] 2 MLJ 853; [2023] CLJU 2648, CA (refd)
*Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217; [1992] 1 MLRA 336, SC (folld)
*Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] 1 MLRA 24, FC (refd)

**Legislation referred to**

Rules of Court 2012 O 28 r 8
Strata Management Act 2013 s 25(3), Second Schedule, para 21(1), 21(2) Fourth Schedule, Part 1, paras 5, 6, 7

**Appeal from**: *City Properties Sdn Bhd & Ors v Badan Pengurusan Bersama Avenue K Dan K Residence* [2024] MLJU 1578 (High Court, Kuala Lumpur)

*Lai Chee Hoe (with Angeline Ang Mei Fong, Ooi Xin Yi and Low Yen Hau) (Chee Hoe & Assoc) for the appellant.*
*Muhammad Shafee bin Md Abdullah (with Aimee Liew Sau Harn, Au Yong Wai Nyan, Muhammad Farhan bin Muhammad Shafee, Thilagan a/p Mehanathan and Ethan Teh Khai Xian) (YH Teh & Quek) for the respondents.*

**Lim Chong Fong JCA:**

INTRODUCTION

**[1]** This is an appeal in relation to voting rights in the annual general meeting of a joint management body pursuant to the Strata Management Act 2013.

**[2]** The appellant/defendant in the High Court is the joint management body of the Avenue K and K Residence which is a strata scheme development in Kuala Lumpur ('project').

**[3]** The respondents/plaintiffs in the High Court are connected corporate bodies and individuals.

**[4]** In this regard, the first respondent is a company and the registered proprietor of the land on which the project is situated as well as the parcel owner of K Avenue and Tower B of K Residence.

**[5]** The second respondent is a company and the developer of the project and parcel owner of unit K-30–3 in Tower A of K Residence.

**[6]** The third respondent is a company and parcel owner of units K-9–5 and K-42–3A in Tower A of K Residence.

**[7]** The fourth respondent is an individual and parcel owner of unit K-43–1 in Tower A of K Residence.

**[8]** The fifth respondent is an individual and parcel owner of units K-46–1 in Tower A of K Residence. She is also a director of the third respondent and seventh respondent.

**[9]** The sixth respondent is a company and parcel owner of units K-47–2, K-48–1 and K-48–2 in Tower A of K Residence.

**[10]** The seventh respondent is a company and parcel owner of unit K-50–1 in Tower A of K Residence.

**[11]** The eighth respondent is a company and parcel owner of unit K-50–2 in Tower A of K Residence.

**[12]** Save for the sixth respondent, the other corporate body respondents have directors who have familial relationship with Tan Sri Dato' Yap Yong Seong and his wife, the fifth respondent (collectively 'Yap family').

**[13]** The respondents and their associated parties have collectively 150,882 aggregate share units in the project which make up about 78% of the total voting shareholding in that strata development scheme.

**[14]** We heard the appeal on 4 July 2024 and 17 October 2024.

**[15]** We thereafter adjourned our decision to deliberate on the arguments put forth by the parties.

**[16]** Now having done so, we give our decision below with our supporting grounds thereto.

BACKGROUND

**[17]** The second respondent completed the project and delivered vacant possession of the parcels in 2008.

**[18]** However, the second respondent did not cause the setting up of the appellant within the statutory period of 12 months; hence the appellant was

A only formed on 15 September 2018 pursuant to the first Annual General Meeting ('AGM').

**[19]** In the premises, the second respondent managed the maintenance charges and sinking fund contribution accounts of the project for ten years and the parcel owners of the K Residence paid the maintenance charges and sinking fund contribution payments to the second respondent.

**[20]** Nevertheless, between June 2016-July 2018, there were five agreements entered between the second respondent and the first respondent which resulted in a contra settlement of utilities and services provided by the first respondent ('contra adjustments') against the maintenance charges and sinking fund contribution payments payable by the second respondent and Tegasari Sdn Bhd which is associated to the Yap family. Furthermore, the respondents did not pay their corresponding maintenance charges and sinking fund contribution payment. In addition, the project maintenance charges and sinking fund contribution accounts were neither fully prepared nor audited.

**[21]** Consequently, during the first AGM of the appellant held on 15 September 2018, the Commissioner of Building who attended the meeting decided that the second respondent as well as the first respondent are not entitled to vote therein.

**[22]** Upon the appellant having been put under the control of the parcel owners not associated with the Yap family, the appellant reviewed the management of the maintenance charges and sinking fund contribution accounts. Consequently, the appellant on 12 April 2019 decided to reverse the contra adjustments and directed the property manager of the project to give effect to the aforesaid reversal.

**[23]** The appellant accordingly on 9 May 2019 commenced Kuala Lumpur Civil Suit No WA-22NCVC-310–05 of 2019 ('Suit 310') to challenge the contra adjustments relating to the non-payment of maintenance charges and sinking fund contribution payments.

**[24]** As the result, the first respondent and it's on 22 August 2019 commenced Kuala Lumpur High Court Originating Summons Nos WA-24NCVC-1754–08 of 2019 ('OS 1754') against the second respondent to primarily invalidate the first AGM and take control of the maintenance and management of the project. The order that was given to the first respondent on 17 September 2019 was set aside on 20 January 2021 upon the appellant's application after its intervention as party thereto.

**[25]** Furthermore, Tegasari Sdn Bhd on 27 November 2019 commenced

Kuala Lumpur High Court Originating Summons WA-24NCVC-2493–11 of 2019 ('OS 2493') to nullify the incorporation of the appellant as well as decisions made as the joint management body of the project. The application was dismissed on 6 October 2020.

**[26]** Subsequently the third, fourth, fifth, seventh, and eight respondents as well as Yap Wee Sean and Tegasari Sdn Bhd also commenced Kuala Lumpur Civil Suit No WA-22NCVC-724–11 of 2020 ('Suit 724') to challenge the reversal of the contra adjustments made by the appellant as well as to nullify all resolutions passed in the second AGM with a consequential order for convening a general meeting of the appellant.

**[27]** Presently Suit 310 and Suit 724 (collectively 'Suits') are pending trial before the same judge.

**[28]** That notwithstanding, the respondents on 7 February 2024 further commenced Kuala Lumpur High Court Originating Summons No WA-24NCVC-510–02 of 2024 ('OS 510') and sought the following reliefs in Bahasa Melayu:

(1) Satu pengisytiharan bahawa Mesyuarat Agung Tahunan Pertama ('AGM Pertama') Defendan yang telah diadakan pada 15.09.2018 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(2) Satu pengisytiharan bahawa semua usul dan/atau ketetapan yang diluluskan pada AGM Pertama adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(3) Satu pengisytiharan bahawa Mesyuarat Agung Tahunan Ke-2 ('AGM Ke-2') Defendan yang telah diadakan pada 23.11.2019 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(4) Satu pengisytiharan bahawa semua usul dan/atau ketetapan yang diluluskan AGM Ke-2 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(5) Satu pengisytiharan bahawa Plaintif-Plaintif mempunyai hak untuk hadir dan mengundi di Mesyuarat Agung Tahunan Ke-3 ('AGM Ke-3') Defendan yang telah dijadualkan untuk diadakan pada 09.03.2024 atau mana-mana tarikh yang ditunda;

(6) Suatu perintah bahawa Pengerusi AGM Ke-3 yang dipilih secara rasmi tidak akan menghalang dan/atau melarang Plaintif-Plaintif daripada mengundi dan akan menerima pengundian-pengundian Plaintif-Plaintif dalam apa-apa usul atau resolusi yang dicadangkan dalam AGM Ke-3;

(7) Secara alternatif, sekiranya Saman Pemula ini tidak dapat didengar sebelum 09.03.2024, suatu perintah bahawa mana-mana Mesyuarat Agung yang diadakan tanpa penyertaan Plaintif-Plaintif adalah batal dan tidak sah, tidak berkesan, dan/atau tidak diketepikan;

A (8) Kos permohonan ini dibayar oleh Defendan kepada Plaintif-Plaintif atas asas penguamcara-anakguam dengan serta-merta;

(9) Plaintif-Plaintif diberi kebebasan untuk memohon untuk menjalankan dan melaksanakan Perintah Mahkamah Mulia ini; dan

B (10) Apa-apa relif yang lain dan selanjutnya seperti dianggap sesuai oleh Mahkamah Mulia ini.

IN THE HIGH COURT

C **[29]** After hearing OS 510 based solely on affidavit evidence, the learned judicial commissioner on 10 May 2024 allowed the application as so recorded ('order'):

D

8. AMPLE PARAMOUNT SDN. BHD.
[No. Syarikat: 599528-P] ...PLAINTIF-PLAINTIF

E DAN

BADAN PENGURUSAN BERSAMA AVENUE K DAN K RESIDENCE
[No. JMB: 965/2018] ...DEFENDAN

F DI HADAPAN PESURUHJAYA KEHAKIMAN
RAJA AHMAD MOHZANUDDIN SHAH BIN RAJA MOHZAN
PADA 10 MEI 2024 DALAM KAMAR

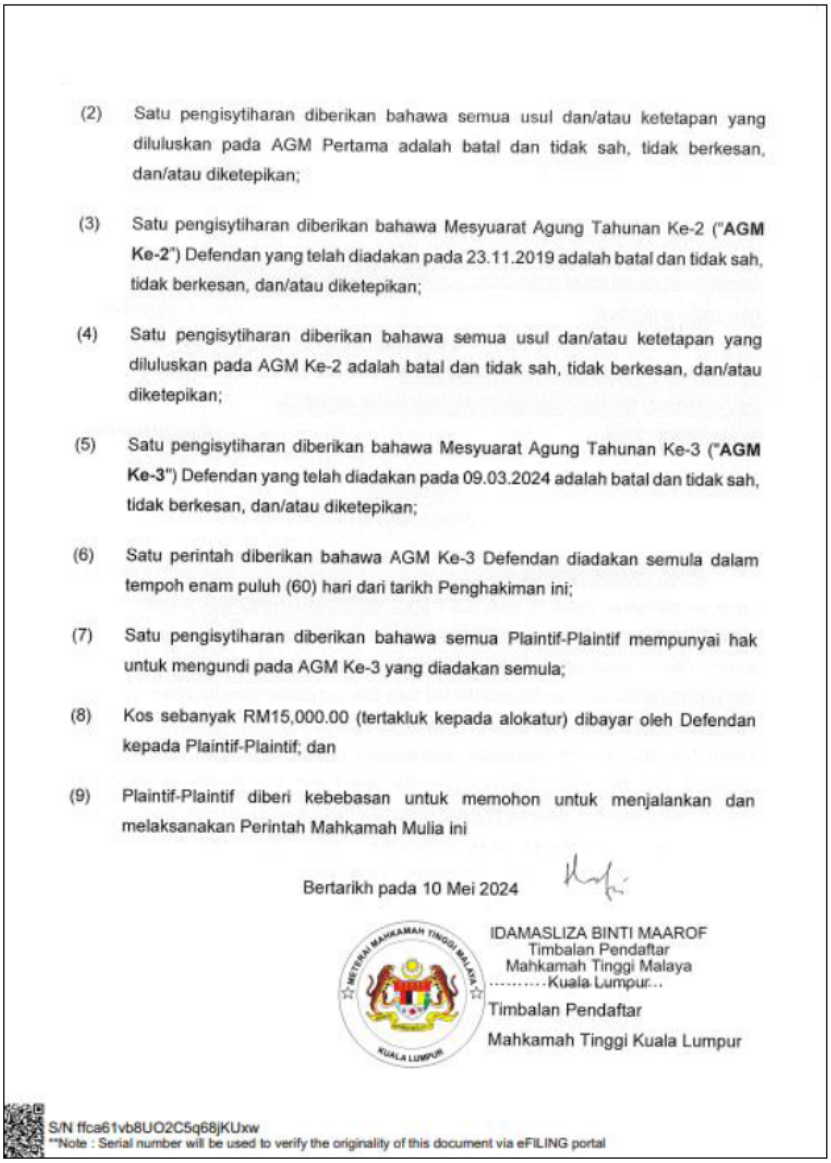
PERINTAH
*(Kandungan 1)*

G **ATAS PERMOHONAN** Plaintif-Plaintif yang dinamakan di atas yang ditetapkan untuk pendengaran pada 19 April 2024 **DAN SETELAH MEMBACA** Saman Pemula bertarikh 7 Februari 2024, afidavit-afidavit dan Hujahan-hujahan Bertulis serta Ikatan-ikatan Otoriti pihak-pihak yang kesemuanya difailkan di sini **DAN SETELAH MENDENGAR** Muhammad Shafee Bin Md Abdullah and Aimee Liew Sau Harn (Au Yong Wai Nyan, Muhammad Farhan Bin Muhammad Shafee, Thilagan A/L Mehanathan and Ethan Teh Khai Xian bersamanya), peguamcara Plaintif-Plaintif dan Lai Chee Hoe (Angeline Ang Mei Fong, Fadhil Hazmi Bin Mohd and Tan Jie Xin bersamanya), peguamcara Defendan **DAN SETELAH** ditetapkan untuk keputusan pada hari ini dalam kehadiran Muhammad Shafee Bin Md Abdullah dan Aimee Liew Sau Harn (Au Yong Wai Nyan, Thilagan A/L Mehanathan and Ethan Teh Khai Xian bersamanya), peguamcara Plaintif-Plaintif dan Ooi Xin Yi (Fadhil Hazmi Bin Mohd and Tan Jie Xin bersamanya), peguamcara Defendan **MAKA ADALAH DIPERINTAHKAN** bahawa:

H

I

(1) Satu pengisytiharan diberikan bahawa Mesyuarat Agung Tahunan Pertama ("**AGM Pertama**") Defendan yang telah diadakan pada 15.09.2018 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;



(2) Satu pengisytiharan diberikan bahawa semua usul dan/atau ketetapan yang diluluskan pada AGM Pertama adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(3) Satu pengisytiharan diberikan bahawa Mesyuarat Agung Tahunan Ke-2 ("**AGM Ke-2**") Defendan yang telah diadakan pada 23.11.2019 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(4) Satu pengisytiharan diberikan bahawa semua usul dan/atau ketetapan yang diluluskan pada AGM Ke-2 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(5) Satu pengisytiharan diberikan bahawa Mesyuarat Agung Tahunan Ke-3 ("**AGM Ke-3**") Defendan yang telah diadakan pada 09.03.2024 adalah batal dan tidak sah, tidak berkesan, dan/atau diketepikan;

(6) Satu perintah diberikan bahawa AGM Ke-3 Defendan diadakan semula dalam tempoh enam puluh (60) hari dari tarikh Penghakiman ini;

(7) Satu pengisytiharan diberikan bahawa semua Plaintif-Plaintif mempunyai hak untuk mengundi pada AGM Ke-3 yang diadakan semula;

(8) Kos sebanyak RM15,000.00 (tertakluk kepada alokatur) dibayar oleh Defendan kepada Plaintif-Plaintif; dan

(9) Plaintif-Plaintif diberi kebebasan untuk memohon untuk menjalankan dan melaksanakan Perintah Mahkamah Mulia ini

Bertarikh pada 10 Mei 2024

IDAMASLIZA BINTI MAAROF
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Mahkamah Tinggi Malaya
.....Kuala Lumpur...
Timbalan Pendaftar
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**[30]** The learned judicial commissioner's broad grounds of decision ('grounds') in support are principally as follows:

> [11] The plaintiffs' cause of action primarily concerns their right to vote as parcel owners, collectively holding 162,998 shares units. The plaintiffs assert that as parcel owners, they are not entitled to deprivation of voting rights under para 21(1) of the

SMA 2013. However, the issue that remains at the core of this legal controversy is narrow in nature, that it, to what extent should the plaintiff's right to vote be denied?

[12] The simple answer lies in in para 21(2) of the SMA 2013, although its applicability in the context of this dispute requires further investigation. Paragraph 21(2) of the SMA 2013 contains the proviso to the mandatory statutory right of each proprietor to vote. Specifically, it addresses the proprietor's disentitlement to vote when there are arrears of charges, sinking find contributions to other sums due to the management corporation.

[13] When it comes to this issue, the defendant maintains that it is a non-starter from the outset. From the defendant's perspective, the statutory exception to the right to vote is strictly applied as a result of the plaintiff's ignoring the repeated reminders that the arrears should be paid, particularly when the plaintiffs themselves knew of the outstanding sums due and owing to the defendant.

[14] Having understood the nature of the dispute in the current OS, it seems to me that the next step is to determine the issue of fact whether there is actually a validly disputed arrears in accordance with the authority derived from the court of Appeal decision of *Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Ors and other appeals* [2024] 2 MLJ 853; [2023] CLJU 2648 which I believe to be not only relevant but could provide some guidance for me in resolving the this dispute. There has also been reference to *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp* [2019] 8 MLJ 549; [2019] 2 CLJ 592 and *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp* [2019] 8 MLJ 549.

[15] In light of the evidence presented to me and without in a way attempting to encroach upon the subject matter of Suit 310 and Suit 724 which are currently pending before The Honourable Justice Akhtar Tahir, my concern here is limited as to whether or not there is a valid dispute before the court specifically on the issue of those arrears. This is the only test that will guide my decision upon encountering the specific issue described in the OS.

[16] In analysing the facts and the authorities referred to me by the plaintiffs and duly distinguished by the defendant, it has become apparent that at this stage of the proceedings there exist a valid dispute before the court in respect of the arrears relating to para 21(2) of the SMA 2013, which ultimately entitles the plaintiffs to vote without regard to the applicable proviso.

[17] Respectfully, I am not in the position to be concerned with either party's legal position in Suit 310 or Suit 724 in light of the nature of the application before me. Based solely on the surface surrounding this issue in the OS, I believe the plaintiffs are not simply refusing to pay out of negligence with deliberate intention. Instead they appear to be heavily reliant on the issue of contra adjustment which will ultimately be determined by The Honourable Justice Akhtar Tahir.

[18] In this context, I find that the main relief sought by the plaintiffs in this action does not fall within the scope of Suit 310 and Suit 724. In this regard, the issue of the plaintiffs' eligibility to vote will not be specifically addressed by His Lordship. It follows that there can be no multiplicity of proceedings concerning this issue which can be resolved in this current OS as The Honourable Justice Akhtar Tahir does not

have to deal with the issue of voting rights.

**[31]** The appellant is dissatisfied with the decision of the High Court and has on 17 May 2024 filed its appeal to the Court of Appeal.

FINDINGS OF THE COURT

**[32]** Before us, the appellant contended that the issues relating to the validity of the first AGM and second AGM is res judicata by reason that they have been dealt and decided in OS 1754 and OS 2493.

**[33]** Moreover, the appellant contended that the default in payment maintenance charges and sinking fund contribution payment is pending determination in Suit 310 and Suit 724. There is thus multiplicity of proceedings here. In any event, the second respondent is guilty of delay in convening as well as tabling the annual budget in the first AGM. Also, the second respondent failed to produce and handover the audited accounts to the appellant.

**[34]** Very pertinently, the appellant contended that the 'validly dispute test' relied by the learned judicial commissioner is applicable only in an interlocutory but not in a final determination in an originating summons in OS 510 here.

**[35]** On the other side, the respondents contended that being parcel owners, they have the statutory right to vote in the AGM of the appellant. The respondents cannot consequently be deprived of their right to vote pending the dispute on the maintenance charges and sinking fund contribution payment following *Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Ors and other appeals* [2024] 2 MLJ 853; [2023] CLJU 2648 (CA).

**[36]** The respondents have been aggrieved in this regard because the maintenance charges and sinking fund contribution payment (including arrears thereto) imposed by the appellant after the first AGM is based on 'per square foot' basis. This imposition is illegal, null and void as it is contrary to s 25(3) of the Strata Management Act 2013 ('the SMA') interpreted in *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act* 1985) [2018] 4 MLJ 284; [2019] 2 CLJ 592 (CA).

**[37]** Since the appellant's alleged arrears in the maintenance charges and sinking fund contribution payment are disputed by the respondents, they rightfully retain their right to vote at any general meeting of the appellant. The AGM can be declared invalid and all resolutions made annulled and avoided based on the Fourth Schedule Part 1, cll 5 to 7 of the SMA.

**[38]** It is plain that our appellate function here is one of review only and this has been succinctly explained by Abdoolcader J (later FCJ) in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] 1 MLRA 24 as follows with emphasis added by us:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. *An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (Charles Osenton & Co v Johnston* [1942] AC 130 (at p 148), per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] 1 MLRA 599 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.
>
> The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett* [1978] AC 297 (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22 on this point (at p 25):
>
> > *... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.*

**[39]** Upon our review of the respondents' application in OS 510 and the eventual order granted, we find that the learned judicial commissioner primarily granted all the reliefs as prayed for by the respondents. These are final and not interlocutory reliefs pending the determination of the issues in the Suits that are presently awaiting trial.

**[40]** The reliefs sought by the appellant in Suit 310 are as follows in Bahasa Malaysia:

> (a) Satu deklarasi bahawa Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan telah gagal menjalankan tanggungjawab statutorinya sebagai Pemaju dan sebagai pengarah-pengarah Defendan Pertama dan telah memungkiri peruntukan-peruntukan di dalam Akta Pengurusan Strata 2013 ('Akta 757');

(b) Satu deklarasi bahawa segala pembayaran secara kontra yang telah dibuat oleh Defendan Pertama melalui pelbagai *'contra adjustment'* bagi caj-caj penyenggaraan berjumlah sebanyak RM3,048,913.61 adalah sah, terbatal dan tidak sah dan perlu dibayar dan/atau dipulangkan oleh Defendan Pertama kepada Plaintif;

(c) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan membayar caj-caj penyenggaraan sebanyak RM474,453.27 bagi Unit K-30-3 yang tidak terjual dan RM180,260.59 bagi unit K-12-5 milik Defendan Pertama dari tarikh milikan kosong diberikan sehingga tarikh pemfailan tindakan ini dan masih terakru dan berterusan menurut kadar yang sama seperti yang telah dibayar oleh pemilik-pemilik unit yang lain secara serta-merta dari tarikh penghakiman ini diberikan;

(d) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan memindahkan amaun sebanyak RM353,020.83 yang masih terakru dan berterusan kepada Plaintif yang merupakan baki amaun dana pengurusan di dalam akaun CIMB yang dipegang oleh Defendan Pertama semasa tempoh pengurusan di bawah Defendan Pertama secara serta-merta dari tarikh penghakiman ini diberikan dan akaun CIMB tersebut ditutup dengan serta-merta selepas amaun baki dana pengurusan tersebut dipindahkan kepada Plaintif;

(e) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan membayar caj-caj penyenggaraan sebanyak RM805,156.86 kepada Plaintif bagi segala amaun yang telah terlibat di dalam 'contra memo' bagi unit-unit yang berkaitan dengan Defendan Kelima dan/atau Defendan Keenam secara serta-merta dari tarikh penghakiman ini diberikan;

(f) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan membayar dan/atau memulangkan semula amaun sebanyak RM380,622.90 kepada Plaintif bagi amaun yang telah dikecualikan ('waived') terhadap beberapa pemilik-pemilik petak K Residence untuk kerja-kerja pembaikan ('defects').

(g) Satu perintah bahawa melainkan hanya Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan membayar amaun-amaun yang disebutkan di perenggan-perenggan (c), (d), (e) dan (f) di atas, Defendan Pertama melalui wakilnya, pekerja dan/atau agennya adalah dihalang daripada mendapatkan hak untuk mengundi dalam sebarang mesyuarat agung tahunan dan juga mesyuarat agung luar biasa;

(h) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Pertama untuk memulangkan amaun sebanyak RM25,103.25 kepada

Plaintif yang merupakan jumlah kos yang telah dicaj secara salah dan tidak sah oleh Defendan Pertama kepada dana pengurusan Plaintif bagi menjalankan Mesyuarat Agung Tahunan pertama yang dijalankan pada 15.9.2018;

(i) Satu deklarasi bahawa Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan telah dengan salah mengenakan caj penyenggaraan serta caj-caj utiliti terhadap dana pengurusan K Residence menurut kadar berdasarkan 'chilled water' bagi penggunaan penghawa dingin, caj bagi penggunaan elektrik di Kawasan tempat letak kereta, penggunaan elektrik bagi sistem pengudaraan dan juga sistem pelupusan sisa sebanyak RM10,029,921,81 tanpa sebarang persetujuan kesemua pemilik-pemilik petak yang lain terhadap Defendan Pertama sejak dari tarikh milikan kosong diberikan;

(j) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan mengembalikan dan/atau memulangkan amaun sebanyak RM10,029,921.81 yang telah dicaj bagi penggunaan penghawa dingin, caj bagi penggunaan elektrik di tempat letak kereta, penggunaan elektrik bagi sistem pengudaraan dan juga sistem pelupusan secara salah terhadap Defendan Pertama yang dicajkan kepada dana pengurusan Plaintif secara serta-merta setelah tarikh penghakiman ini diberikan;

(k) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Plaintif untuk membayar berdasarkan kos sebenar bayaran caj-caj utiliti yang disebutkan di perenggan-perenggan (i) dan (j) di atas terhadap dana pengurusan bersama berdasarkan kos untuk menyenggara peralatan tersebut secara sama rata oleh kesemua pemilik-pemilik petak berdasarkan unit syer masing-masing dan bukan menurut kadar berdasarkan formula pengiraan yang tidak adil;

(l) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan untuk membayar caj-caj penyenggaraan termasuk *sinking fund* tertunggak sejak Julai 2008 sehingga April 2019 sebanyak RM71,471,572.00 bagi keseluruhan petak milik Defendan Kelima dan/atau Defendan Keenam termasuk keseluruhan petak 1 (Avenue K) serta blok-blok sementara dari tarikh milikan kosong diberikan sehingga April 2019 dan masih berterusan;

(m) Satu perintah bahawa melainkan hanya Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan membayar caj-caj penyenggaraan yang dinyatakan di perenggan (l) di atas, Defendan Kelima dan/atau Defendan Keenam melalui wakilnya, pekerja dan/atau agennya adalah dihalang daripada mendapatkan hak untuk mengundi dalam sebarang mesyuarat agung tahunan dan juga mesyuarat agung luar biasa;

(n) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau secara

berasingan untuk mengemukakan sebarang bukti yang sahih berkenaan dengan hakmilik yang didakwa kepunyaan Defendan Kelima ke atas tingkat 5 dan tingkat 6 di bangunan K Residence tersebut;

(o) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan untuk memasang meter air dan elektrik bagi tingkat 5 dan 6 tersebut serta membayar kesemua caj-caj penyengaraan termasuk sinking fund sebanyak RM441,094.00 bagi tingkat 5 dan RM338,999.00 bagi tingkat 6 yang dikira berdasarkan kadar yang dibayar oleh pemilik-pemilik petak yang lain yang tidak pernah dibayar langsung oleh Defendan Kelima dan/atau Defendan Keenam dari tarikh milikan kosong diberikan sehingga tarikh pemfailan tindakan ini dan masih terakru dan berterusan kepada dana pengurusan Plaintif sekiranya tingkat 5 dan tingkat 6 di bangunan K Residence tersebut adalah milik mutlak Defendan Kelima;

(p) Secara alternatif, satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan untuk membayar sewa bagi jumlah yang akan diputuskan di dalam perjanjian sewaan di antara Plaintif dan Defendan Kelima bagi penggunaan tingkat 5 dan tingkat 6 bangunan K Residence tersebut kepada Plaintif sekiranya Mahkamah memutuskan bahawa tingkat 5 dan tingkat 6 tersebut adalah merupakan harta bersama;

(q) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan untuk mengemukakan segala bukti berkenaan dengan kelulusan Plaintif serta pelan-pelan pembinaan bagi kerja-kerja binaan yang telah dilakukan di bumbung atas bangunan Avenue K yang telah menceroboh ke dalam Kawasan harta bersama K Residence;

(r) Satu perintah bahawa Mahkamah yang Mulia ini mengarahkan Defendan Kelima dan/atau Defendan Keenam secara bersama dan/atau berasingan untuk menghentikan semua kerja-kerja pembinaan di perenggan (p) tersebut secara serta-merta dari tarikh penghakiman ini sementara menunggu kelulusan dari pihak Plaintif untuk pelan-pelan kerja pembinaan tersebut;

(s) Satu deklarasi bahawa kesemua penyata akaun beraudit yang telah diaudit oleh Defendan Ketujuh dan/atau Defendan Kelapan sejak tahun 2008 secara bersama dan/atau berasingan adalah sesungguhnya salah, terbatal dan tidak sah;

(t) Satu perintah bahawa Mahkamah yang Mulia ini melantik satu juruaudit bebas yang bertauliah untuk membuat semula kerja-kerja audit penyata akaun milik Defendan Pertama dan kos untuk kerja-kerja audit semula tersebut ditanggung oleh Defendan Pertama dan/atau Defendan-Defendan Kedua, Ketiga dan Keempat secara bersama dan/atau berasingan;

(u) Secara alternatif, ganti rugi am untuk ditaksirkan oleh Mahkamah Yang Mulia ini yang harus dibayar secara bersama dan/atau berasingan oleh

Defendan-Defendan kepada Plaintif bagi kerugian serta kesusahan yang telah dialami oleh Plaintif serta keseluruhan pemilik-pemilik petak K Residence yang lain sejak dari tarikh milikan kosong diberikan sehingga tarikh penghakiman ini diberikan;

(v) Faedah pada kadar 5% setahun ke atas gantirugi seperti di perenggan (c), (d), (f), (h), (j), (l),(o), dan (u) dari tarikh tuntutan ini difailkan sehingga tarikh penyelesaian penuh;

(w) Kos tindakan ini; dan

(x) Lain-lain relif yang dianggap sesuai oleh Mahkamah Yang Mulia ini.

**[41]** In Suit 724, the reliefs sought by third, fourth, fifth, seventh and eight respondents as well as Yap Wee Sean and Tegasari Sdn Bhd are as follows in Bahasa Melayu:

(a) Suatu deklarasi bahawa pengakasan Defendan Pertama terhadap pelarasan-pelarasan kontra berikut antara Plaintif-Plaintif sebagai pemilik-pemilik petak, Plaintif Ke-2 yang berjanji untuk menjalankan pembangunan K Residence dan Defendan Ke-9 —

(i) Pelarasan kontra RM918,650-60 pada 30.6.2016;

(ii) Pelarasan kontra RM741,565-00 pada 30.6.2017;

(iii) Pelarasan kontra RM257,032-10 pada 31.12.2017;

(iv) Pelarasan kontra RM130,902-00 pada 2.4.2018; dan

(v) Pelarasan kontra RM195,607-05 pada 30.7.2018,

adalah menyalahi undang-undang dan tidak sah;

(b) Suatu deklarasi bahawa semua ketetapan yang diluluskan di Mesyuarat Agung Tahunan Ke-2 Defendan Pertama pada 23.11.2019 adalah batal dan tidak sah;

(c) Suatu perintah berbangkit bahawa suatu mesyuarat agung Defendan Pertama boleh diadakan dan bahawa Mahkamah yang Mulia ini boleh memberi arahan-arahan berkenaan dengan cara bagaimana mesyuarat agung tersebut hendaklah dipanggil, diadakan, dan dijalankan dan apa-apa arahan sampingan dan berbangkit yang difikirkannya suai manfaat;

(d) Terhadap Defendan-defendan Pertama, Ke-2, Ke-3, Ke-4, Ke-5, Ke-6, Ke-7 dan Ke-8 secara bersesama dan berasingan, ganti rugi dan ganti rugi hendaklah ditaksir;

(e) Faedah dari tarikh penghakiman hingga tarikh penyelesaian penuh dan muktamad;

(f) Kos;dan

(g) Apa-apa relief selanjutnya atau lain yang dianggap adil dan suaimanfaat oleh Mahkamah yang Mulia ini.

**[42]** However, we observed from the learned judicial commissioner's grounds that OS 510 has been unconditionally allowed solely based on the premise as a matter of fact there is a valid dispute by the respondents over the arrears on the maintenance charges and sinking fund contribution payment which are neither negligent nor deliberate.

**[43]** We further noticed that the learned judicial commissioner in interpreting para 21 of the second Schedule SMA had disregarded the proviso therein.

**[44]** Paragraph 21 second Schedule of the SMA provides as follows:

> 21 Voting rights of proprietor
>
> (1) Each proprietor who is not a co-proprietor shall have one vote in respect of each parcel on a show of hands, and on a poll, shall have such number of votes as that corresponding with the number of share units or provisional share units attached to his parcel or provisional block.
>
> (2) A proprietor shall not be entitled to vote if, on the seventh day before the date of the meeting, all or any part of the Charges, or contribution to the sinking fund, or any other money due and payable to the management corporation in respect of his parcel are in arrears.

**[45]** We find the learned judicial commissioner erred by disposing the whole of OS 510 in favour of the respondents solely and entirely based on the finding there is prima facie in existence a valid dispute on arrears pertaining to maintenance charges and sinking fund contribution payment by the respondents which have already been referred to court.

**[46]** In this respect, it is plain as expressed in the grounds that the learned judicial commissioner only considered para 21(1) but not the proviso in para 21(2) Second Schedule of the SMA. The approach taken was erroneous because both paragraphs must, in our view, be read and considered together. They involved mixed matters of fact and law including on the contravention of s 25(3) of the SMA advanced by the respondents.

**[47]** We observed that the respondents in their endeavour to justify non-payment of the maintenance charges and sinking fund contribution arrears stressed that the resultant first AGM and second AGM resolutions that included the imposition of these arrears on them by the appellant must be impugned.

**[48]** The appellant however strenuously rebutted that the respondents cannot take advantage of their own wrong particularly because the second respondent as the developer of the project did not comply with the provisions

of the SMA when managing the project for about ten years.

**[49]** Based on our analysis of the cause(s) of action and reliefs sought in the Suits, we find that they overlap and are inextricably intertwined with the cause(s) of action and reliefs sought in OS 510. The satisfactory and fair resolution of all these related matters of fact and law must in our view be resolved altogether by way of a trial. In this respect, we are firstly unable to agree with the approach taken by the learned judicial commissioner that OS 510 can be resolved by deciding on a single issue on the existence of a valid dispute. As far as we are concerned, it is artificial and definitely unsatisfactory to merely inquire into the existence without also dealing with the ultimate validity of the dispute when construing and applying para 21(1) and the proviso in para 21(2) Second Schedule of the SMA together. The learned judicial commissioner erred by only considering the former but not the latter as alluded to in para [16] of the grounds.

**[50]** Secondly, it follows that the learned judicial commissioner has further erred by disposing the entire OS 510 based only on affidavit evidence without holding a trial. In actuality, the learned judicial commissioner gave the final reliefs sought by the respondents despite the existence of seriously disputed facts apart from that of law too. Reliance has been made on the case of *Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Ors* but, upon our scrutiny, we find the application therein is an interlocutory injunctive relief in a writ action but not final reliefs pursuant to an originating summons. It is trite that an interlocutory injunction application may be decided purely based on the existence of a bona fide dispute following *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 AMR 373 (CA).

**[51]** Consequently, we are of the view there is a serious misdirection made by the learned judicial commissioners that warrants our appellate intervention.

**[52]** That notwithstanding, we also find the learned judicial commissioner should have in the interest of justice converted OS 510 into a writ action pursuant to O 28 r 8 of the Rules of Court 2012 which reads as follows with emphasis added by us:

> *Continuation of proceedings as if cause or matter begun by writ*
>
> (1) *Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun* by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the court decides to make such an order referred to in rule (1), Order 34 shall apply with the necessary modifications.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Any reference in these rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.

This may be undertaken on the learned judicial commissioner's own volition.

**[53]** We are, in this regard, guided by the following dicta of Mohamed Jemuri Serjan CJ (Borneo) in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217; [1992] 1 MLRA 336 (SC) with emphasis added by us:

[19] In any case it is most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence and in this respect we would echo the words of Lord Diplock in *American Cyanamid v Ethicon Ltd* [1975] AC 396 at p 407:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

[20] The same Law Lord spoke in almost similar vein in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 MLRA 143:

> Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.

[21] Encik Ernest Chua, Counsel for the respondents, in reply submitted that O 28 r 8(1) was not relevant and that the proceedings were correctly commenced under O 88 r 2(1)*, arguing that there was nothing in* O 88 r 2(1) which required that proceedings under s 304(1) be begun by writ. *In his view the learned judge had considered O 28 r 8(1) but it was clear that it did not appear to the learned Judge in the proceedings before him that the matter should be continued as if it had been begun by writ. In other words, his argument was that the learned Judge had considered O 28 r 8(1) but decided not to exercise his discretion to order the proceedings to continue as if they had been begun by writ. We are, regrettably, unable to share this view with the same gravity because, having regard to the various unsatisfactory aspects of the case that we have alluded to in detail earlier on, the better discretion to exercise is for the learned Judge to order the proceedings to continue pursuant to O 28 r 8(1).*

[22] While we accept Encik Cecil Abraham's submissions that from the point of

procedure and practice and for the reasons we have explained above this is a proper case for the application of O 28 r 8(1) we do not, however, lend countenance to his submission that we should apply the principle laid down in the English Companies (Winding-up) Rules 1948 nor their successor the Insolvency Rules 1987 for obvious reasons.

[23] We were referred to the case of *Tay Beng Chuan v Official Receiver and Liquidator* [1987] 2 MLJ 419; [1987] 1 MLRA 523, a Court of Appeal case which principally lays down a ruling that where a trial judge was wrong in the exercise of his discretion under O 28 r 8(1) when he failed to order pleadings, discovery and a full trial on the merits but heard the application under s 305 of the Singapore Companies Act summarily, thereby resulting in an injustice or a miscarriage of justice the Court of Appeal would interfere if clearly satisfied that the decision was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or the other. In that case the Singapore Court of Appeal having regard to all the circumstances of the case ordered pursuant to Rules of the Supreme Court O 28 r 8(1) the proceedings to continue as if they had been begun by a writ of summons and the parties hereto deliver pleadings in accordance with O 18.

[24] In dealing with the question of procedure and practice in relation to O 28 r 8(1) the learned judge in the court below seemed to take the view that since HLE had not been wound up the appropriate order to apply is O 88 r 2(1), relying on a passage at p 625 of Walter Woon's book entitled 'Companies Act of Singapore: An Annotation'. The passage reads:

> Where the company is not being wound up an application under this section should be made by originating summons: Rules of the Supreme Court, 1970, O 88 r 2(1).

[25] Probably the learned judge was also persuaded to take that view because the first appellant in para 3(d) of his affidavit stated that there was no provision either under the Companies Act or the High Court Rules that the respondents could commence this action by originating summons. *The learned judge is correct in quoting O 88 r 2(1) of the Rules of the High Court 1980 in answer to the appellants' argument on that score but in our view he is not precluded in the exercise of his discretion from making an order that the proceedings should be continued as if begun by writ pursuant to O 28 r 8(1) bearing in mind also O 5 r 2(b). Indeed, it is within his absolute discretion and he is justified to do so in the circumstances of this case in order to resolve the conflicts of affidavit evidence and reach a well-balanced decision.*

**[54]** As the result, we further find that the learned judicial commissioner erred in failing to exercise his discretion properly to have all the matters of fact and law in issue here satisfactorily resolved. This is a non-direction that again justifies appellate intervention.

## CONCLUSION

**[55]** For the foregoing reasons, we unanimously hereby allow the appeal and the decision of the High Court is set aside. We further direct that OS 510 be

converted into a writ and the affidavits filed therein to stand as pleadings and be disposed by the same judge hearing the suits.

**[56]** We award costs of RM30,000 to the appellant subject to allocator as costs here and below.

*Appeal allowed.*

Reported by Nabilah Syahida Abdullah Salleh